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In the SUPREME COURT OF THE UNITED STATES

KAREN SCHULTE,
Petitioner
vs.
JOHN E. POTTER,
Postmaster General, USPS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard of review for bench trials is properly understood by the courts of review below.

2. Whether the Tenth Circuit used an improper standard to test the evidentiary basis for the lower court's findings of fact.

3. Whether the Tenth Circuit improperly denied Petitioner relief from the lower court's evidentiary rulings.

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OPINIONS BELOW

None of the Orders issued in the instant case has been reported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC 1254 (1). The Order and Judgment under review is that of the Tenth Circuit Court of Appeals, January 26, 2007, Case No. 05-5209, "Pet. App. A." Appellant's Petition for Rehearing and for En Banc Review was denied without comment by Order of March 29, 2007, "Pet. App. D."

CONSTITUTIONAL AND STATUTORY PROVISIONS

All relevant law is contained in Appendix E.

STATEMENT OF THE CASE

Karen Schulte ("Petitioner" or "Schulte") was dismissed from her position at the United States Postal Service ("Respondent," "USPS" or "post office") on or about March 5, 2002.

Petitioner brought seven claims against the USPS, only two of which went to trial (1) failure to promote and (2) wrongful discipline, both as violations of the ADEA.

Schulte filed a motion challenging Respondent's discovery responses, which motion was disallowed by Order of the Northern District of Oklahoma, November 2, 2004, Case No. 03-CV-361, "Pet. App. C." During Schulte's trial on the merits, the trial court also disallowed evidence crucial to her theory of the case. Pet. App. A, 11a-13a.

On October 19, 2005, the District Court's Findings of Fact and Conclusions of Law, "Pet. App. B," held that Schulte had not proved age discrimination, a decision upheld by the Tenth Circuit on January 26, 2007. Pet. App. A.

Schulte asked for reconsideration, as well as for en banc review, claiming that the standard used by the Tenth Circuit to review Schulte's allegation of a faulty standard of proof below was itself faulty, both of which requests were denied by the Court on March 29, 2007. Pet. App. D.

REASONS FOR GRANTING THE WRIT

It is apparent that the Tenth Circuit believes that the standard under which it chooses to conduct its review of a lower court decision determines the degree of scrutiny to which that decision should be subjected, as the analysis below makes evident. The confusion that reigns in the appellate world over appellate-review nomenclature shows this error to be commonplace. *See, e.g., Dickinson v. Zurko*, 527 U.S. 150 (1999) (historical discussion of standards of review); *Concrete Pipe & Products of Cal. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), Thomas, J., concurring (discussing and distinguishing evidentiary and review standards); *Armour & Co. v. Wilson & Co.*, 274 F.2d 143, 155, 124 USPQ 115, 124-25 (7th Cir. 1960), Newman, J., with whom Rader, J., joins, dissenting ("'[F]acts,' 'primary facts,' 'subsidiary facts,' 'evidentiary facts,' 'ultimate facts,' 'physical facts,' 'documentary facts,' 'oral evidence,' 'inferences,' 'reasonable inferences,' 'findings of fact,' 'conclusions,' 'conclusions of law,' 'questions of fact,' 'questions of law,' 'mixed questions of law and fact,' 'correct criteria of law'...[W]e are all too frequently dealing in semantics.").

Of course, the legal and evidentiary issues that are brought before an appellate court should each be scrutinized with equal attention precisely to ensure that they are subjected to the proper standard.

Instead, as the standard of review becomes more "deferential," the reviewing court's gaze seems to grow in laxity. The instant matter is a perfect case in point. The Court should take this opportunity both to do justice in the individual instance and to offer guidance to the courts below as to the proper standard of appellate review for bench trials, notwithstanding any "deference" due the decision at issue.

I. CERTIORARI IS NEEDED TO CLARIFY THE APPELLATE REVIEW STANDARDS AT ISSUE

A. Sufficiency, Clear Error, and de Novo Review

The Federal Rules of Civil Procedure say that the "findings of fact" from a bench trial are to be subjected to a "clear error" standard on appeal, emphasizing the "due regard" accorded the trial judge's estimate of "the credibility of the witnesses." F.R.Civ.P. 52(a); Pet. App. E, 86a.

But that same Rule instructs that the appealing party may question "the **sufficiency** of the evidence supporting the findings." F.R.Civ.P. 52(b); Pet. App. E, 87a.

Now it is immediately apparent even on the face of the Rule that "sufficiency" and "clear error" are notions that operate independently of each other. *See, e.g., Dilley v Supervalu, Inc.,* 296 F.3d 958 (10th Cir. 2002) (challenge to sufficiency of evidence not permitted in instance where appealing party did not renew motion for JMOL at close of evidence; review conducted **instead** under plain error standard). How must they interact if Rule 52 is to be given its intended effect? And if a trial court factual assessment of witness credibility shows itself to be at odds with evidence in the record, does any degree of deference that may otherwise operate under a "clear error" standard diminish under a less deferential test for "sufficiency"?

"Sufficiency" is the pivot around which appellate review of bench trials should turn, a fact apparent even in the way in which that language is—regrettably without the least regard for the conceptual structure of the Rule--factored into the provision itself (embedded in §(b), but flinging itself about not only in reference to the subsection of the Rule in which it finds itself, but to the preceding and following subsections as well). Having "due regard" for credibility assessments and leaving the lower court's findings of fact intact unless "clearly erroneous"--especially in the sense in which those concepts operate in the Tenth Circuit, that is, like

an invitation to evaluate the supporting evidence under a substantial evidence standard instead—must be modified by Rule 52's invocation of the notion of "sufficiency."

If the reviewing court is required to judge the "sufficiency" of the evidence supporting the trial court's findings of fact, it has necessarily been commissioned to consider closely all the evidence acting in that capacity.

It should therefore be obvious that the evidentiary underpinnings of the lower court's findings of fact must be scrutinized closely to see whether those underpinnings show the court to have committed clear error under Rule 52. *Anderson v. City of Bessemer City, North Carolina,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed. 2D 518 (1985) (""[a] finding is 'clearly erroneous' when **although there is evidence to support it**, the reviewing court **on the entire evidence** is left with the definite and firm conviction that a mistake has been committed.") (emphasis added), *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *Id.* at 581, Powell, J., concurring (expressing concern that the Court's decision could be taken as an implied criticism of the lower court "for the very fact that it engaged in a comprehensive review of the entire record of this case," a criticism which could be taken as encouraging "overburdened Courts of Appeals simply to apply Rule 52(a) in a conclusory fashion, rather than to undertake the type of burdensome review that may be appropriate in some cases.").

The question that the reviewing courts should ask, then, is this: "Is the evidence taken on the record as a whole of such a character and weight, with "due" (which is to say, "some") deference given to the trial court in its decisions about credibility--those not contradicted or overwhelmed by the record taken as a whole--such that no error may clearly be predicated of its factual findings?"

And when, as in the instant case, the reviewing court

is asked to assess the standard of proof used by the lower court, it must ask if, whether independently of the trial court's invoked standard of proof, the proper standard has actually been employed, an inquiry by definition conducted de novo. *See* Pet. App. A, 13a-14a (de novo review appropriate for district court's application of legal standard).

To recapitulate: the deference accorded a district court decision under Rule 52 should take shape in relation only to witness credibility and should be given its scope by the modest modifier "due."

Since under Rule 52 the reviewing court must decide whether the evidence allows it to predicate clear error of the lower court, it must weigh, and test, and probe that evidence sufficiently to allow it to determine whether error is clearly present. *See, e.g., Allentown Mack Sales & Service, Inc. v. NLRB,* 83 F.3d 1483, (reversed and remanded after extensive review of record to determine if agency below met evidentiary demands despite "deferential" standard of review); *Board of the County Commissioners of Bryan County, Oklahoma v. Brown,* 520 U.S. 397 (1997) (high court reviews evidence extensively for sufficiency; vacated and remanded); *see also, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (reversed); *McCowan v. All Star Maintenance, Inc.*, 273 F.3d 917, 921 (10th Cir. 2001) (evaluating separate instances extricated from their overall context "robs the incidents of their cumulative effect").

On the other hand, if the question the appellate court has been asked to review concerns the correctness of the standard under which the lower court made its decision, as a question of law the review is conducted de novo.

The appellate court's Order and Judgment (Pet. App. A) is deficient in precisely the ways outlined above.

Although declaring that its review should be conducted de novo, the Tenth Circuit admitted repeatedly that it did not review the court below under that standard. In fact, it often did not review even under the clear error standard demanded by Rule 52, using what was in effect a substantial evidence standard instead. Under either head, these errors demand reversal.

B. Abuse of Discretion

A court abuses its discretion when it uses that discretion to the legal prejudice of a party with insufficient legal justification. *See, e.g., In re Wray*, 433 F.3d 376 (Fed. 4th Cir. 2005).

The decision of the lower court will be set aside under this standard if the reviewing court becomes convinced that there was "a clear error of judgment" on the part of that lower court in the way in which it accorded weight to "the relevant factors." *Lowry v. Long Island Rail Road Company*, 370 F.2d 911 (2nd Cir. 1966).

For this tribunal to overturn the reviewing court's Order and Judgment refusing to set aside the trial court's evidentiary decisions for abuse of discretion, it must itself review the individual facts of the case before the trial court to determine whether the appellate court refused to recognize that the lower court used its discretion to Petitioner's legal detriment without sufficient legal justification. *See, e.g., Beech Aircraft Corp v. Rainey*, 488 U.S. 153, 176, 109 S.Ct. 439, 102 L.Ed. 2D 145 (court abused discretion in restricting scope of cross-examination); *U.S. v. Abel,* 469 U.S. 45, 54-55, 105 S.Ct. 465, 470, 836 L.Ed. 2D 450 (no abuse of discretion in admitting evidence because it caused no undue prejudice).

Two trial court evidentiary decisions prejudiced Petitioner's prosecution of her case on the merits without sufficient legal justification or support and should therefore be reversed.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE TENTH CIRCUIT USED AN IMPROPER STANDARD TO TEST THE EVIDENTIARY BASIS FOR THE LOWER COURT 'S FINDINGS OF FACT

Petitioner repeatedly made the point in her Petition for Rehearing and for En Banc Review, requesting of the Tenth Circuit that it reconsider its Order and Judgment (Pet. App. A), that appellate review of the decision below had not been conducted under the proper standard. Petitioner's request was denied without comment. Pet. App. D, 84a.

Petitioner's argument was essentially that the Tenth Circuit panel, while ostensibly reviewing for plain error actually applied a substantial evidence standard. *Yzaguirre v Barnhart*, 2003 C10 262 (USCA10, 2003) (substantial evidence standard of review requires appellate court "deference" to lower court findings).

Of course, "deference" sounds very close to what is required of the clear error standard in many of the permutations that the clear error standard takes. *Elmore v. Capstan, Inc.*, 58 F.3d 525, 529-31 (10th Cir. 1995) (review under the clearly erroneous standard requires upholding "any determination falling within a 'broad range of permissible conclusions'"; with "two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous") (citations omitted).

Both standards also require that the record be reviewed to ensure that it supports the lower tribunal's findings. *See* 29 U.S.C. § 160(e) (factual findings of the Board conclusive "if supported by substantial evidence on the record considered as a whole"). See also the *Anderson* Court's admonition above that ""[a] finding is 'clearly erroneous' when...the reviewing court on the entire evidence

is left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S. at 573.

Since both standards uphold the lower tribunal if the evidence is present in the record as a whole to support that tribunal's findings, the difference between them must lie elsewhere.

The key to that difference can be found in the phrase "if the evidence is present to support it."

What evidence?

In the case of the test for substantiality, "substantial" evidence.

In the case of the test for clear error, "sufficient" evidence.

In the former, the test is merely whether there is evidence present such as "**could** satisfy a reasonable factfinder." *Allentown,* 83 F.3d at 1483. In other words, it is a truly deferential standard. If the record in its entirety has **any** evidence that satisfies this minimum standard in support of each of the points at issue, no further inquiry is permitted.

In the case of "sufficient" evidence, however, the term itself at once alerts the attentive reader that more is required. The record is examined not for what evidence might satisfy the hypothetical reasonable person, but rather that "which [**actually**] satisfies the [**actual**] court" before which the argument is being made that the "requisite" facts exist. *Id.*

What is it concerning the requisite facts about which the court must be satisfied?

The court must be satisfied that each fact when viewed within the whole of the record—that is, the evidence taken together and in context--does not reveal that a mistake was made. So it is a deferential standard only in a remote sense. It necessarily conducts a search for the "weaknesses, implausibilities, inconsistencies, incoherencies, or

contradictions" outlined by the *Morgan* Court that may reveal the trial court to have been mistaken. *See Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997). In other words, it examines the countervailing evidence in a way disallowed by the search for substantiality.

If such countervailing evidence is found, it may be used under the clear error standard to overturn a judgment in a way that countervailing evidence may not be used once substantial evidence has been found under that less exacting standard.

What standard did the Tenth Circuit use in its review of the countervailing evidence in the instant case?

It consistently ignored any countervailing evidence, when it did not actually do violence to that evidence through the expedient of misanalysis and outright mischaracterization. *See* Pet. App. A, 13a-33a, wherein the trial evidence is examined in complete deference to the trial judge's view of that evidence.

In other words, the appellate panel used the least stringent standard of review to which the decision of a lower court may be subjected, substantial evidence, rather than clear error, especially when clear error is invigorated by the rigor it assumes when joined to a test for "sufficiency."

Petitioner will examine below the rule that requires in the instant case a standard even more rigorous than that of clear error modified by the notion of sufficiency. But in order to establish that, even if that stricter standard is not required, a standard higher than the one actually employed by the trial court is necessary, she will first review the appellate court's analysis to show that it was not conducted under the "clear error" standard, but rather a "substantial evidence" standard, which in itself calls for reversal.

A. The Lower Court's Standard of Proof

Petitioner's primary argument in the court below pointed to the trial court's litany that there was "no evidence" in support of Petitioner's case, and demonstrated that the mere reiteration of that phrase did not make it so. It is impossible to emphasize sufficiently the danger of the Tenth Circuit's lack of response to this argument, offering--as its appellate panel did--excuse after excuse for the miserably crafted, illogical, paralyzing posture adopted by the district court, choosing, as that lower court did, to write off argument after analytical argument with a cursory swish of its pen.

Petitioner's chief point is that the district court **chose to consider only direct evidence on certain crucial matters**, turning its back on volumes of circumstantial evidence, dismissing those volumes as having no evidentiary effect or value. Otherwise, the district court would not have emphasized repeatedly that Petitioner had no evidence concerning so many pivotal issues. If that court claimed that certain evidence did not exist, but the evidence demonstrably did exist, then the court was signaling its studied refusal to consider it.

The alternative is far worse, the one, in fact, offered implicitly by the appellate court: the district court was uttering gibberish. When the appellate court seeks to excuse the district court by saying in effect that it meant the contrary of what it actually said (Pet. App. A, 15a), it implicitly makes that argument.

While Petitioner argues in her briefs only against the first, more reasonable, of these alternatives, it should be obvious that either of them endangers the appellate process. If the first, trial courts will feel free to make up the rules as they go along. When they see that the evidence is leading to

an undesirable result, they can simply push great swathes of that evidence into the memory hole under the rubric of "no evidence," then find for the favored party on the basis of what is left.

While Petitioner does not suggest that this has been a conscious ploy on the part of the present trial court, even with the most benign of motives the result is the same. The refusal of a court to consider the competent evidence before it is reversible error. *See, e.g., Weeks v. Angelone*, 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) ("[T]his Court reversed a sentence of death because the trial judge had refused to consider mitigating evidence: '[I]t was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf.'"), *citing Eddings v. Oklahoma,* 455 U.S. 104, 114 (1982); *Mergentime Corporation v. Washington Metropolitan Area Transit Authority, et al.,* 166 F.3d 1257 (trial court refusal to consider argument reversible error); *Malone v. California State College, Stanislaus*, 988 F.2d 120 (9th Cir. 1993) (refusal of trial court to entertain argument on sufficiency of evidence requires remand); *Gilbert v. Sterrett*, 509 F.2d 1389, 1397-98 (trial court erroneous in declaration of "no evidence" when evidence can be found in the record).

Petitioner will focus below on but two examples of the many instances of this sort of reversible error which she asked the Tenth Circuit to consider.

If the second alternative—that the court is uttering gibberish--is the right one, on the other hand, it is at least as important that the practice be stopped. A trial judge's recitation of the facts should reflect what is actually in the record. *Ramey Construction Company, Inc., v. Apache Tribe of the Mescalero Reservation*, 616 F.2d 464 (10th Cir. 1980)

(appellate court unwilling to review findings if "unable to ascertain the legal theories under which the trial court was operating"); *Emerson Electric Co. v. Farmer*, 427 F.2d 1082 (5th Cir. 1970) ("contradictory findings and conclusions" reversible error).

Petitioner offered about twenty instances of the trial court's exclusion of circumstantial evidence through its use of the phrase "no evidence" or one of its variants. To this extensive list the Tenth Circuit replied merely that on certain points Petitioner "presented no competent evidence, direct or indirect, while on others she presented no persuasive evidence either because the witness was not credible or less credible than another witness, the testimony was irrelevant, immaterial, speculative, or nonprobative, or the testimony conflicted with other testimony that the court considered persuasive." Pet. App. A, 15a.

No matter which of the alternative explanations for the lower court's inaction could be right, the reviewing court is wrong. It has not met Petitioner's argument--that the lower court used the wrong standard--with the right standard of its own. It has not dealt with the lower court's refusal to review the evidence by pointing to how and why it determines that "no evidence" **really** means "incompetent," "conflicting," "unpersuasive," or "irrelevant" evidence. This is hardly the probing that Petitioner has shown above is required to test the lower court for sufficiency. Much less is it the de novo review which the court admitted it was obliged to conduct. Pet. App. A, 15a.

How can the reviewing court determine that the court below did not clearly commit error if it refuses to take that lower court at its own word, merely declaring that "[i]t is clear" that the words it puts into the mouth of the lower court are as the reviewing court says they are! Pet. App. A, 15a.

What is clear instead is that the record reveals that once the trial court announced that certain evidence did not exist, it brushed it conveniently into the memory hole.

B. Lila Lawrence and the No-Evidence Syndrome

The district court said that there was "no evidence" that Lila Lawrence was lying. Pet. App. B, 44a. If we take the court at its word, and therefore know that it did not include in its review of the record any evidence that Lila Lawrence might have been lying, Pet. App. B, 39a-42a, 44a, then we know that it excluded the following from its consideration of her truthfulness.

First, the irregularities in her investigation of Petitioner's purported wrongdoing, which included her personal collection of statements prejudicial to Petitioner, many of them having nothing to do with that purported wrongdoing, and many of which contradicted each other; her use of those statements to Petitioner's detriment while ignoring and hiding the available exculpatory evidence and the contradictory nature of the evidence she chose to submit; her finally being forced to submit Petitioner's exculpatory evidence in spite of her reluctance to do so; her declaration that the contradictory statements were reliable and contained the witnesses' "complete understanding" of the events surrounding Petitioner's removal as an employee, and that they had been collected from all the eyewitnesses (none of which proved true); her immediate impulse and decision to destroy evidence tending to exonerate Petitioner, and her failure to guard the chain of custody for the remaining evidence; her reliance upon a witness whom she claimed to consider extremely reliable, but who had—precisely during the time that Lawrence was relying on her--identified evidence that Lawrence chose to destroy on the spot because of its falsity; each one of which actions tend to cast serious doubt upon Lawrence's veracity and reliability as a witness.

Next, Lawrence's failure to investigate whether

Schulte would even have benefited from her purported acts of wrongdoing, essential to determine whether she had a motive for carrying them out. Such an investigation would have been easily conducted, according to witnesses whose interests were contrary to those of Petitioner, testifying as they did on behalf of the post office.

Next, Lawrence's conflicting testimony as to why she had improperly filled out an application for Petitioner to Petitioner's disadvantage, and her attempt to explain away the fact that she had no trouble filling out precisely the same application properly for another employee at the same time.

Next, Lawrence's failure to adequately explain her admitted misrepresentations to the EEO concerning the reasons for Petitioner's discharge.

Finally, Lawrence's failure to utter a single word during three entire years of litigation concerning crucial aspects of her own participation in the events of Petitioner's removal, during which three year period Lawrence testified repeatedly about that removal. Having kept the facts closely to herself for this entire length of time, on the day of trial, in a sudden burst of memory she recollected that she had in fact been an eyewitness to the critical events herself and could offer fresh testimony about them on the stand!

Now, since the issue here is whether or not there was any evidence in the record that would show that Ms. Lawrence was being less than honest, the reviewing court was under an obligation to submit this set of circumstances to a withering eye to ensure that the court below did not commit clear error in its assertion that there was "no evidence" that her testimony suffered from that unhappy impediment.

Withering is not the modifier that leaps to mind once the reviewing court's analysis is itself analyzed, whether that court was required to review the evidence as part of the record as a whole for its sufficiency in order to exclude clear error, or under a de novo standard. The review it conducted

is in fact an obvious effort at minimalization. It mentions only four of these facts, almost in passing, and then declares them to be "minor," "irrelevant," and such as do not "**exclusively** suggest age bias" (emphasis added), with no explanation as to why. Pet. App. A, 25a-26a.

If this be not a review for mere substantial evidence, or possibly for something less than substantial evidence, then it is difficult to conceive a review that is.

Whether or not Lawrence was acting disingenuously in the conduct outlined above bears strongly on whether or not she was being dishonest in saying that she was not motivated by Petitioner's age when she acted to remove Petitioner from the USPS. Since Lawrence was a key player in Petitioner's removal, this was a critical matter for both courts to consider. Neither court did so.

Disparate treatment may be shown by indirect or circumstantial evidence, *Reeves v. Sanderson Plumbing Products, Co.*, 530 U.S. 133 (2000). Since direct evidence is rare in discrimination cases, *Huff v. UARCO, Inc.*, 122 F.3d 374, 380 (7th Cir. 1997), Plaintiffs must typically rely on indirect evidence. Evidence that an explanation is "unworthy of credence" is "one form of circumstantial evidence... probative of intentional discrimination." *Id.* at 147. Indirect evidence is regarded as the evidentiary equal to direct evidence not only because it is "sufficient," but because it "may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, n. 17 (1957).

It is unfortunate that the page limitations that Petitioner is working within do not permit a more detailed exposure of the manner in which both of the courts below repeatedly and studiously avoided their duty to apply the correct standard to the issues. She will offer but one more example before turning to the court's own admission that it used the wrong standard in its review of this case.

C. Petitioner and the No-Evidence Syndrome

According to the district court, Petitioner admitted that she had "no evidence" of discrimination in her own case.

Not only is this absurd on its face since Petitioner was in the midst of a four day trial when she said it, with witness after witness offering testimonial evidence on her behalf, but it was error on the part of the trial court to ascribe this legal conclusion to a laywitness. All that Petitioner can be deemed to have admitted, at least all that logic and reasonable jurisprudence permit, is that she had no smoking gun in hand.

Petitioner asks the instant Court to take judicial notice that as a layperson she was not qualified to draw the legal conclusion the district court put into her mouth, and furthermore that this specific legal conclusion is an absurdity of the first water. Had Petitioner meant what the district court said she meant, she would not have 1) gotten by a motion for summary judgment, 2) spent four grueling days putting on witness after witness and introducing hundreds of pages of documentary evidence before a largely unsympathetic court, and 3) survived Respondent's motion for judgment as a matter of law.

The Tenth Circuit panel said of Petitioner's evaluation of the trial court's declaration that she had "admitted" during the course of the trial that she had "no evidence" of age bias (Pet. App. A, 31a), that it was but another instance of Petitioner's "flawed" characterization of the trial court's repeated use of that concept. Pet. App A, 15a.

However, in rejecting Petitioner's "flawed" evaluation, saying that the phrase "no evidence" actually meant instead "no competent evidence...no persuasive evidence...irrelevant, immaterial, speculative, or nonprobative [evidence]," or "conflict[ing]testimony," (Pet. App. A, 15a), nowhere among these alternative meanings does the Tenth Circuit produce one responsive to Petitioner's **actual** evaluation of this trial court assertion, namely, that it

puts a legal conclusion in the mouth of a layperson.

Instead, using a diversionary tactic, the review panel asserts that it can find "nothing improper" in "the district court's accurate finding as to Schulte's express agreement that she had not presented any 'incidents' or other 'anecdotal evidence' that showed Lawrence was motivated by age bias." Pet. App. A, 31a.

But Schulte never made any connection between these two propositions, on the one hand that she had no smoking gun evidence and on the other that she had no anecdotal evidence. The district court never explains how a failure to offer a mere list of "anecdotes" translates into a failure to offer any evidence. And to the extent that Petitioner's evidence on this score might have been lacking, the appellate panel fails to take into account that the trial court was itself responsible for creating any such lack.

First, the trial court did not permit Petitioner to discover evidence that would have shown that the USPS engaged in a pattern and practice of age discrimination, which would have allowed her to offer a suitable substitute for anecdote. Petitioner will deal with this matter below.

Next, it failed to permit Petitioner to develop her case at trial with evidence showing that this pattern and practice was alive and well when Petitioner was removed from the USPS. She will deal with this notion below as well.

Appellate review, then, was erroneous, first, because it deferred entirely to the trial court's view of the evidence.

Second, and more seriously (and contradictorily!), it did not let the trial court speak for itself.

The trial court said repeatedly that it found for Defendant USPS because there was **no** evidence to sustain Petitioner's position. Pet. App. A, 14a-15a. If the trial court, to which such deference was accorded otherwise, did not mean "no evidence," it had ample opportunity--having taken many months to reach its decision--to clarify this point.

But when deference was not enough to give the trial court what it wanted, the review panel decided to go that extra mile and substitute its own clever notions for those of the lower court. This is precisely the sort of egregious sleight of hand that cannot properly survive under a clear error standard, with or without "sufficiency" to give it added rigor, requiring reversal by this Court.

D. Appellate Admission of Its Use of an Improper Standard

The Tenth Circuit panel stated that since the ruling at issue was based "only on [Petitioner's] failure to present any direct evidence of discrimination when in fact, according to her, she presented a large quantity of indirect evidence that supported her claims,'" she was "in effect contend[ing] that the district court committed a legal error." Pet. App. A, 15a.

Petitioner agrees.

The panel concluded, "We review the district court's application of legal standards **de novo**," *citing Sinajini v. Bd. of Educ.*, 233 F.3d 1236, 1240 (10th Cir. 2002). Id. (emphasis added).

Petitioner agrees as well with this assessment.

Having given theoretical utterance to the law in terms as succinct as it is possible for a mind trained in legal niceties to produce, the court immediately produced a collision with itself in mid-air, as the following review makes exceedingly clear (all emphases added).

About the testimony of Dr. Stone the court said, "We conclude that the district court's findings of fact as to Stone **are not clearly erroneous**." Pet. App. A, 18a.

About the testimony of Petitioner herself the court said, "The district court disagreed with Schulte's evaluation of the evidence, and we see **no clear error** in that disagreement." Pet. App. A, 19a.

About Paula Quinn, the appellate court offered its opinion that it saw "**no clear error** in the district court's

treatment of Quinn's testimony as it relates to Cameron." Pet. App. A, 21a.

About Lynne Jones, the appellate court concluded that there was "**no clear error** in the district court's conclusion" that her testimony was not persuasive. Pet. App. A, 22a.

About discrepancies in Jeffrey Dalton's testimony the court said that "The district court's resolution of these two plausible versions of events **cannot be clearly erroneous**." Pet. App. A, 25a.

About Lila Lawrence the reviewing court said that "[e]ven if Schulte is correct, the alleged fabrication does not exclusively suggest age bias such that we might see **clear error** in the trial court's conclusion that Lawrence had a good-faith belief that Schulte had recirculated the mail." Pet. App. A, 26a.

About testimony concerning Susan Beck, the court said that "it supports one of two plausible findings, and the district court's choice between them **cannot be clearly erroneous**." Pet. App. A, 27a. Moreover, "Inconsistencies that may be attributable to differences in employer representatives or human error are of insufficient probative value to render the district court's findings in this case **clearly erroneous**." Pet. App. A, 28a.

About Jackie Bouffard, the court said that "[n]othing in her testimony suggests that the district court's factual finding was **clearly erroneous**." Pet. App. A, 29a.

About Pam Cameron credibility issues were resolved with "**no clear error**." Pet. App. A, 31a.

In every discussion, in fact, of every witness, the appellate court declared that it was using a clear error standard, although it had just admitted that its job was to conduct a de novo review. Of course, we have seen above that it actually employed an even more deferential standard than the already deferential one it declared itself to be using.

This is error on its face, and demands reversal.

Pullman Standard v. Swint, 456 U.S. 273, 273-74, 102 S.Ct. 1781, 72 L.Ed. 66 (1982) (different standard of review results in a different outcome) (citation omitted); *Salve Regina College v Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("When de novo review is compelled, no form of appellate deference is acceptable"; in review for clear error, panel would affirm; under de novo standard, panel would reverse) (citation omitted); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) ("Because the Court of Appeals applied a less demanding standard in this case, we vacate the judgment and remand the case for further proceedings consistent with this opinion.")

III. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE TENTH CIRCUIT IMPROPERLY DENIED PETITIONER RELIEF FROM THE LOWER COURT'S EVIDENTIARY RULINGS

The district court erred in making two evidentiary decisions without sufficient legal basis, prejudicing Petitioner in the prosecution of her case on the merits.

First, the trial court did not permit Petitioner to discover statistical evidence that would have shown that the USPS engaged in a pattern and practice of age discrimination.

To the extent that the lower courts complained of Petitioner's failure to produce evidence in support of her case (recall its litany of "no evidence"), trial court permission to discover pattern and practice evidence would have more than satisfied the lack. It would have provided the finder of fact with the key to Petitioner's theory of the case, namely that the adverse employment actions taken against her were the result of an unwritten USPS policy to rid itself of older workers.

Next, the trial court failed to permit Petitioner to develop evidence at trial showing that this policy was in place when Lila Lawrence, acting as surrogate for the postmaster, removed Petitioner.

Essential to Petitioner's theory of the case was that Susan Beck, the postmaster, was merely carrying out this unwritten policy by arranging to have Petitioner removed from her position.

A. The Lower Courts, in Ruling Against Petitioner's Request for Statistical Evidence, Denied Her an Essential Piece of the Mosaic

To successfully request a reversal in an evidentiary matter, a party "must make a clear showing she suffered prejudice, and the ruling...affected her substantial rights." *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 773 (10th Cir. 1999) (citation omitted).

Petitioner had a constitutional right to a trial on the merits for her age discrimination claims. She was seriously hampered in her efforts to bring critical evidence that bore on her claims to the attention of the finder of fact. This is by definition prejudice. She hopes that the irony of this prejudice does not escape the attention of the Court. Her good faith efforts to obtain the evidence she needed to prove her case under the liberalized Rules of Civil Procedure were stonewalled at every turn by an unnecessarily technical straitjacketing of the rules. When she had to proceed to trial without that evidence, those who withheld the evidence did not scruple to point out repeatedly that it was lacking.

Either this Court should find that Petitioner is entitled to proceed before a factfinder under a different standard so that she has a fighting chance with the evidence she already has, or she should be given access to the evidence that gives her a fighting chance before she proceeds, or--if justice be a consideration--both.

First, it bears emphasis that the district court's repeated refrain that Petitioner had "no evidence"; its minimizing of the testimony of her expert witness for lack of

"empirical data," Pet. App. A, 17a; Pet. App. B, 55a; and its permission for her to go forward with her case on a theory of pattern and practice, Pet. App. A, 21a-22a, all make it clear that the lack of the statistical evidence she sought prejudiced her severely in the presentation of her case on the merits.

And she sought this evidence repeatedly. Numbers 3-8 of her First Set of Interrogatories sought, for example, the identity and ages of Tulsa district applicants and selectees for the Associate Supervisor Program, Detail Bank positions, and Officer-in-Charge positions. In Request for Production No. 21, Schulte sought the personnel files of all USPS personnel who were awarded positions for which Schulte had applied and been rejected during 2000 through 2002, in part to discover their ages.

At a hearing in June, 2004, Schulte argued that she needed the statistics at issue to show a pattern or practice of age discrimination and that, especially in view of the unavailability of much of the other evidence she sought, statistical age based data was critical to her case.

The record therefore establishes Petitioner's persistence in pursuing age-related discovery in order to develop her case. Certainly by June, 2004, far in advance of the October, 2004, hearing on Petitioner's motion to reopen discovery, the post office understood Petitioner was seeking statistical information sufficiently to argue that it did not want to "create reports based on 'statistics concerning the age of Defendant's work force.'" Pet. App. A, 6a.

First, it is clear, then, that Petitioner suffered enormous – in fact, fatal--legal prejudice from having her timely and diligently pursued requests denied, but that Respondent has yet to identify a single one of its legal interests that would have been impacted negatively by a

decision favorable to Petitioner on this discovery issue. Second, it is clear that an erroneous discovery ruling that affects the substantial rights of the parties invites reversal. *Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.* , 136 F.3d 695, 705 (10th Cir. 1998).

District court discovery rulings are reviewed for abuse of discretion. *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995). If the appellate court sees "that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances," it should reverse. *Nieto v. Kapoor*, 268 F.3d 1208, 1221 (10th Cir. 2001) (internal quotation marks omitted). While district courts have a great deal of leeway in managing their own courtrooms, that leeway is "not unbridled." *Nepsk Inc. v. Town of Houlton* 283 F.3d 1 (1st Cir. 2002), *citing United States v. Roberts*, 978 F.2d 17, 20 (1st Cir. 1992).

It is surely an error of judgment if in the light of legal prejudice to one party and none to another, a trial court makes a decision based substantially upon its choice of a set of "magic words." The trial court compared Petitioner's written discovery requests for "the makeup of the USPS workforce according to age," with her later explanation that this would provide her with "statistical data of [USPS] promotion practices," and finding that they did "not square" with each other, denied their production. Pet. App. C, 81a.

It is so obvious that it bears only the briefest mention that in an age discrimination case that includes a claim for failure to promote, the purpose of a request for the makeup of a workforce according to age is to provide the requesting party with statistical data to show that the party was denied promotion because of age.

The trial court's "magic words" solution to what it

perceives as something other than a straightforward discovery dispute is surely nit-picking of the highest order. Petitioner would ask that this Court declare that nit-picking of the highest order is by definition "beyond the bounds of permissible choice" in a lawsuit to vindicate important civil rights, and therefore an abuse of discretion.

On alternate grounds, the trial court denied Petitioner's requests because she did not meet and confer with opposing counsel before filing her motion to re-open discovery.

With respect to a motion to reopen, the relevant factors include: 1) proximity of the trial date, 2) whether it is opposed, 3) prejudice to the non-moving party, 4) the moving party's diligence, 5) the need for additional discovery, and 6) relevance. *Smith v. United States*, 834 F.2d 166, 169 (10th Cir. 1987).

All of these factors but number 2 weigh heavily in Petitioner's favor. We have already covered numbers 3, 4, 5, and 6. As to number 1, the court had just extended the trial date several months into the future.

The trial court later recharacterized her motion to reopen discovery as one to compel discovery, but Petitioner had no way of knowing at the time that she filed her motion to reopen that what she had filed in good faith with a particular object in view would work to her prejudice on a technicality.

Petitioner believes that this fits within the parameters of excusable neglect. "[A]t bottom [an excusable neglect determination is] an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 385, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). The

factors for the consideration of the court are "[1] the danger of prejudice to the [nonmoving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." Id.

This is essentially a shorter version of the list of factors the court considers when deciding on a motion to reopen discovery, outlined above. We have already seen that they weigh heavily in favor of Petitioner. About Number 3, particularly relevant here, the instant Court has this to say: "Congress plainly contemplated that the courts would be permitted to [invoke excusable neglect because of] inadvertence, mistake, or carelessness, not just [because of] intervening circumstances beyond the party's control. This flexible understanding comports with the ordinary meaning of 'neglect.'" Id.

The appellate panel ignored Petitioner's clear proof that it is not only the Illinois' courts that have endorsed the concept that the law will not require one to engage in a "clearly useless" act, but the Tenth Circuit as well. *McGraw v. Prudential Ins. Co.*, 137 F.3d 1253, 1263 (10th Cir. 1998). It also ignored the fact that whether or not to reopen discovery is not amenable to face to face resolution.

But if Petitioner thought she was filing a motion to reopen, those arguments show that she had a good faith basis to act as she did. Because the discovery deadline had long since passed, Petitioner believed herself to be filing just such a motion. *Nepsk,* 283 F.3d at fn. 6 (party's argument that failure to comply with local meet and confer rule caused by excusable neglect "persuasive").

She understandably did not take the same precautions

she would have taken had she believed herself to be filing a motion to compel. But, in any case, the Tenth Circuit did not apply what should have been controlling law. If it was not persuaded to enter judgment in Petitioner's favor on the bases argued above, it should have remanded with instructions to reopen discovery for the limited purpose of allowing Petitioner to discover the statistical data she sought. *Hartnett v. O'Rourke,* 69 Fed. Appx. 52 (10th Cir., 2003) (although Appellants neither preserved the issue of discovery for appeal nor complied with the local rule concerning the out-of-court resolution of discovery disputes, the documents they sought "could be quite significant"; therefore remanded to "allow further opportunity for discovery").

Mistaken good faith failure to comply with a local rule should be treated as excusable neglect when a holding to the contrary will have the drastic effect of fatally prejudicing the party whose failure occasioned the holding.

B. The Lower Court, in Ruling Against Petitioner's Attempt to Introduce Testimony at Trial, Denied Her an Essential Piece of the Mosaic

The standard of review for evidentiary rulings at trial is that of abuse of discretion. Having already outlined the elements for that standard above, we will not repeat them here, but such a review is "setting specific," asking if "the district court correctly weighed appropriate factors." *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404 (C.A.10 (Colo.), 1991), *citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981).

Applying that notion to the instant case, the relevant facts are as follows. First, the appellate panel granted that Petitioner had made an offer of proof at trial. Pet. App. A, 12a. It nevertheless objected that Petitioner's argument

briefed in support of that offer of proof fell only "under the same general category" as her argument at trial. Id. Apparently, the appellate court also has a "magic words" fixation, believing that it can require of an objecting party only words that it endorses in order to permit an objection.

The trial court repeatedly sustained opposing counsel's objections to Petitioner's line of questioning, a line of questioning intended to show that her station manager "did not want Petitioner removed [from her supervisory position] because she did a good job for him **but that 'he had to have that happen.'**" Id. (emphasis added). The appellate court characterized this evidence as an expression merely of the opinion of Petitioner's supervisor as to her work performance "and the fact that he did not want her removed." Id.

But this explanation does not suffice. If Petitioner's supervisor did not want to demote her, but nevertheless "had to have that happen," precisely the line that Petitioner was pursuing at trial, Petitioner was entitled to find out how and why "he had to have that happen."

It is Petitioner's theory of her case that it was Susan Beck, the postmaster at the time, who had instructed supervisor Steve Lundak to remove Petitioner from this management track position. As a member of the team that denied Petitioner yet another management track position on another occasion, and as someone admittedly consulted in Petitioner's dismissal, Beck was a key player in dashing Petitioner's dreams of advancement within the postal service.

This additional testimony would have shown clearly that the USPS through Postmaster Beck targeted Petitioner, derailing her from her management goals.

Yet both trial and appellate courts refused to see the relevance, and the fundamental unfairness--not to mention the legally irrational nature--of the decision that kept Petitioner from pursuing this crucial line of evidence.

The appellate panel accepted Petitioner's position that

she should have been permitted to pursue the Susan Beck angle. Pet. App. A, 13a. It then contradictorily based its decision not to permit Petitioner to pursue that angle on the gratuitous notion that Petitioner "made no showing that Beck's role in [the removal from her position at issue by supervisor Lundak] was motivated by age bias." Id.

If Petitioner was prohibited from pursuing this line of questioning from the outset, how could she have shown anything about it at all?

To the extent that the anticipated outcome of this line of questioning, together with all the other excluded, omitted, and mischaracterized pieces of the mosaic (see generally all the argument above) show Respondent's motive for the adverse employment actions it took against Petitioner to be other than its stated reason, to that extent an inference of age discrimination may be made. *Reeves v. Sanderson Plumbing Products, Co.*, 530 U.S. 133 (2000).

This is the sort of evidence that the instant Court has found to be "the evidentiary equal to direct evidence not only because it is 'sufficient,' but because it "may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, n. 17 (1957). *See also Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) ("weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" may all show that employer's reasons are unworthy of belief). Since direct evidence is rare in discrimination cases, *Huff v. UARCO, Inc.*, 122 F.3d 374, 380 (7th Cir. 1997), Plaintiffs must typically rely on indirect evidence.

The appellate panel grants that Schulte had a right to pursue the questioning of her supervisor as to the facts surrounding her removal from the position at issue. She has shown the panel's only remaining reason to deny her relief on this matter (that she has not drawn a direct connection between her removal from that position and her age) to be

without foundation. The District Court's denial of her right to use the evidence of her removal for the purpose for which she proposed to use it at trial should therefore be reversed as an abuse of discretion. *See, e.g., Beech Aircraft Corporation v. Rainey Beech Aerospace Services, Inc v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988), (district court abused discretion by restricting scope of cross-examination); *Brooks v. Barnhart*, 78 Fed.Appx. 52 (10th Cir. 2003) (district court abused discretion in refusing to permit witness testimony); *Jodoin v. Toyota Motor Corp.*, (1st Cir. 2002) (evidence deemed irrelevant by trial court found to be relevant by reviewing court, which therefore found both that the "district court abused its discretion...and that this error was not harmless").

While this appeal was pending before the Tenth Circuit, Petitioner sent a Citation of Supplemental Authority to the review panel, pursuant to FRAP 28(j), notifying it of a Tenth Circuit case that had just been decided bearing directly on the issues in the instant case. *Mendelsohn v. Sprint/United Management Company*, 466 F.3d 1223, 1228 (10th Cir. 2006) This newly decided case enunciated principles which should have been considered by the review panel as binding upon its review. *Mendelsohn* made the point that, as a general matter, an "evidentiary ruling is entitled to deference...But the court's discretion over evidentiary matters should not unfairly prevent a plaintiff a full opportunity to present her case." Id.

Speaking of the specific type of evidence the plaintiff in that case sought to introduce, the court characterized it as "certainly not conclusive evidence of age discrimination itself, but...surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation." Id. For this reason, "the evidentiary exclusion deprived Mendelsohn of a full opportunity to present her case to the jury." Id. The Tenth

Circuit concluded that "the district court abused its discretion in excluding the evidence," reversing and remanding. Id.

While in principle this case is about as much on point as a case can get, the panel in the instant case declared it to be "unpersuasive." Petitioner asks that this Court declare it persuasive, both in principle and in its applicability to the case at bar, and reverse the Tenth Circuit accordingly.

CONCLUSION

Petitioner respectfully prays the Court grant a writ of certiorari in order to entertain the further merits of her position.

Respectfully submitted,
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